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Bank Muamalat (M) Bhd v Hexagon Holdings Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22M-88–08 OF 2013
ASMABI MOHAMAD JC
5 FEBRUARY 2014

Banking — Banks and banking business — Loan agreement — Breach of terms of loan agreement — Failure to repay loan — Claim by bank against defendant as corporate guarantor — Conclusiveness of certificate of indebtedness — Whether guarantees and indemnities void due to absence of consideration or due to past consideration

Civil Procedure — Summary judgment — Application for — Whether real or bona fide defence shown — Critical examination of affidavits and documentary exhibits — Defendant failing to establish triable issues

The plaintiff had granted loan facilities to two companies, namely Metal Advance Substrate Technology Sdn Bhd and Hexagon Tower Sdn Bhd ('the borrowers'). The payments of the facilities were guaranteed by the defendant executing a corporate guarantee and indemnity agreement and a deed of guarantee and indemnity. The borrowers defaulted repayment of the facilities and were wound up. Hence, the plaintiff claimed against the defendant as the corporate guarantor for repayment of the facilities. The plaintiff exhibited the certificate of indebtedness to prove the amount due and outstanding. The plaintiff applied to enter summary judgment against the defendant. The defendant raised the following issues which it claimed to be triable issue: (a) that it was not the party to the facilities agreements; (b) that the certificate of indebtedness was not conclusive as it did not mention the name of the defendant and the plaintiff; (c) that the certificate of indebtedness did not clearly depict the breakdown of the amount due and outstanding; and (d) that by executing the corporate guarantees and indemnities, the defendant did not receive any consideration from the said facilities.

Held, allowing the application with costs of RM4,000:

(1) When deciding an O 14 application, the court must look at the whole situation and be satisfied that the defendant has no fair or reasonable probability in having a real or bona fide defence. The court has a duty to peruse and examine all affidavits and documentary exhibits critically before making a decision (see para 21).

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(2) The defendant could not arbitrarily dispute the accounts of the plaintiff without showing evidence of manifest errors in its affidavit. In order to challenge the correctness and/or conclusiveness of the certificate of indebtedness, something more was required of the defendant other than raising the same vide his learned counsel's written and oral submission (see para 24).

(3) Clause 24 of the deeds of guarantee and indemnity and cl 2(o) of the guarantee and indemnity stipulated that the certificate of indebtedness issued by the plaintiff was conclusive proof of indebtedness to the plaintiff. Hence, the plaintiff was only required to exhibit the certificate of indebtedness and once this was done, there was conclusive evidence before the court of the defendant's indebtedness to the plaintiff (see para 26).

(4) In relation to the contention that the guarantees and indemnities were void as there was no consideration and/or due to past consideration, there were no merit in this line of argument, as there are ample authorities on point to illustrate the validity of those kinds of guarantees and indemnities. This type of plea must be rejected as it did not give rise to bona fide issue, which is required to be tried (see para 33).

(5) The plaintiff had demonstrated to the court that its application was correctly and properly filed and the defendant had not discharged the burden to establish triable issues requiring a trial of the plaintiff's claim (see para 34).

[Bahasa Malaysia summary

Plaintif telah memberikan kemudahan-kemudahan pinjaman kepada dua syarikat, iaitu Metal Advance Substrate Technology Sdn Bhd dan Hexagon Tower Sdn Bhd (peminjam-peminjam). Bayaran untuk kemudahan dijamin oleh defendan melaksanakan perjanjian jaminan dan indemniti korporat serta surat ikatan jaminan dan indemniti. Peminjam-peminjam mengingkari pembayaran semula kemudahan-kemudahan dan telah digulungkan. Oleh itu, plaintif menuntut terhadap defendan sebagai penjamin korporat untuk pembayaran semula kemudahan-kemudahan itu. Plaintif mengekshibitkan sijil keberhutangan untuk membuktikan jumlah terhutang dan tertunggak. Plaintif memohon untuk memasukkan penghakiman ringkas terhadap defendan. Defendan membangkitkan isu-isu yang berikut yang mana dia mendakwa adalah isu yang boleh dibicarakan (a) bahawa ia bukan pihak kepada perjanjian kemudahan; (b) bahawa sijil keberhutangan tidak muktamad kerana ia tidak menyebut nama defendan dan plaintif;(c) bahawa sijil keberhutangan itu tidak menggambarkan dengan jelas pecahan jumlah terhutang dan tertunggak; dan (d) bahawa dengan melaksanakan jaminan dan indemniti korporat, defendan tidak menerima apa-apa balasan daripada kemudahan-kemudahan itu.

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Diputuskan, membenarkan permohonan dengan kos sebanyak RM4,000:

(1) Apabila memutuskan permohonan A 14, mahkamah hendaklah melihat pada keseluruhan keaadan dan berpuas hati bahawa defendan tidak mempunyai kebarangkalian yang adil dan munasabah dalam mempunyai pembelaan sebenar atau bona fide. Mahkamah mempunyai tugas untuk membaca dengan teliti dan memeriksa kesemua afidavit dan ekshibit dokumentar secara kritis sebelum membuat sesuatu keputusan (lihat perenggan 21).

(2) Defendan tidak boleh dengan sewenang-wenangnya mempertikaikan akaun plaintif tanpa menunjukkan keterangan terhadap kesilapan yang nyata dalam afidavit itu. Dalam usaha untuk mencabar ketepatan dan/atau kemuktamadan sijil keberhutangan, sesuatu yang lebih diperlukan daripada defendan selain daripada membangkitkan perkara yang sama melalui penghujahan bertulis dan lisan peguamcaranya (lihat perenggan 24).

(3) Klausa 24 surat ikatan jaminan dan indemniti dan klausa 2(o) jaminan dan indemniti menetapkan bahawa sijil keberhutangan yang dikeluarkan oleh plaintif adalah bukti muktamad keberhutangan terhadap plaintif. Oleh itu, plaintif hanya perlu untuk mengekshibit sijil keberhutangan dan jika ini telah dilakukan, terdapat keterangan muktamad di hadapan mahkamah keberhutangan defendan kepada plaintif (lihat perenggan 26).

(4) Dalam hubungan kepada hujahan bahawa jaminan dan indemniti adalah tidak sah kerana tiada balasan dan/atau kerana balasan yang lalu, tidak terdapat merit dalam hujahan ini, kerana terdapat banyak autoriti-autoriti pada perkara itu untuk menunjukkan keesahan jenis-jenis jaminan dan indemniti tersebut. Pli sebegini hendaklah ditolak kerana ia tidak membangkitkan isu bona fide, yang mana perlu untuk dibicarakan (lihat perenggan 33).

(5) Plaintif telah mendemonstrasikan kepada mahkamah bahawa permohonannya telah difailkan dengan betul dan wajar dan defendan tidak dilepaskan daripada beban untuk membuktikan isu-isu yang boleh dibicarakan yang memerlukan perbicaraan terhadap tuntutan plaintif (lihat perenggan 34).]

Notes

For cases on application for summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8879–8950.

For cases on loan agreement, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2617–2627.

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Cases referred to

Ali @ Abdul Aziz bin Hassan v Perwira Affin Bank Bhd [2007] 4 MLJ 209, CA (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ (Rep) 14; [1992] 1 CLJ 627, SC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd [2004] 4 MLJ 453, CA (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332; [1987] CLJ (Rep) 120; [1987] 2 CLJ 9, SC (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312; [1994] 1 CLJ 328, SC (refd)

Kewangan Bersatu Bhd (formerly known as Kewangan Usaha Bersatu Bhd) v Sidax Latex Industries Sdn Bhd [2006] 2 MLJ 9, CA (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183, SC (refd)

National Company of Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283, FC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)

Perwira Habib Bank (M) Bhd v Saiyo Sdn Bhd & Ors [1991] 3 CLJ (Rep) 451, HC (refd)

Standard Chartered Bank Malaysia Berhad v Foreswood Industries Sdn Bhd & Anor [2004] MLJU 175; [2004] 6 CLJ 320, HC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 2

J Kannaperan (Shearn Delamore & Co) for the plaintiff.
Gideon Tan (CC Neoh with him) (Gideon Tan Razali Zaini) for the defendant.

Asmabi Mohamad JC:

INTRODUCTION

[1] This was a claim by the plaintiff bank against the defendant for:

(a) the recovery of the sum of RM2,652,920.84 which was due and outstanding as at 12 July 2013 on the Muamalat Restructuring *Tawarruq*-i Facility ('Tawarruq-i Facility (1)') granted to Advance Metal Substrate Technology Sdn Bhd ('Customer (1)');

(b) compensation for late payment on the overdue amount of RM512,232.61 or balance thereof at 1%pa from 13 July 2013 until maturity of the financing on 15 August 2016 and thereafter at the

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Interbank Islamic Money Market ('IMMR') currently at 2.91%pa on the principal outstanding of RM1,870,589.05 or balance thereof until the date of full and final settlement;

(c) the recovery of the sum of RM9,272,057.32 which was due and outstanding as at 12 July 2013 on the Muamalat Restructuring *Tawarruq*-i Facility ('Tawarruq-i Facility (2)') availed and granted to Hexagon Tower Sdn Bhd ('Customer (2)');

(d) compensation for late payment on the overdue amount of RM2,954,227.84 or balance thereof at 1%pa from 13 July 2013 until maturity of the financing on 15 October 2015 and thereafter at the Interbank Islamic Money Market (IMMR) currently at 2.91%pa on the principal outstanding of RM1,870,589.05 or balance thereof until the date of full and final settlement; and

(e) costs of this action and this application on a solicitor client in basis.

[2] Upon perusal of the affidavits and the relevant submissions filed herein and upon hearing learned counsel for the plaintiff and defendant, on 12 November 2013 this court allowed summary judgment to be entered against the defendant as prayed in encl 5 with costs fixed at RM4,000. The defendant being dissatisfied with the said decision appealed to the Court of Appeal Malaysia against the whole of the said decision.

THE APPLICATION

[3] For the purpose encl 5, the following documents were filed herein and considered by this court:

(a) the writ and statement of claim dated 15 August 2013 (encls 1–2);

(b) defence dated 13 September 2013 (encl 7);

(c) notice of application under O 14 of the Rules of the Court 2012 dated 4 September 2013 (encl 5);

(d) the plaintiff's affidavit in support of encl 5 affirmed by Ong Chong Hui affirmed on 3 September 2013 (encl 6);

(e) the defendant's affidavit affirmed by Cha Chee Pin on 20 September 2013 (encl 8); and

(f) the plaintiff's affidavit in reply affirmed by Ong Chong Hui on 4 October 2013 (encl 9).

[4] The grounds for the said encl 5 were as stated in the said enclosure as well as the abovementioned affidavits (encls 6 and 9) respectively. In essence,

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the plaintiff averred that neither there were merits in the defendant's defence, nor could the defendant raise triable issues to merit a full-blown trial.

BACKGROUND FACTS

[5] The plaintiff had granted *Tawarruq*-i Facility to Customer (1) and (2) namely Metal Advance Substrate Technology Sdn Bhd and Hexagon Tower Sdn Bhd as follows:

(a) *Tawarruq*-i Facility (1) up to the limit of RM1,950,000 to Customer (1); and

(b) *Tawarruq*-i Facility (2) up to the limit of RM9,000,000 to Customer (2).

[6] The relevant documents for *Tawarruq*-i Facility (1) granted to Customer (1) were as follows:

(a) letter of offer dated 21 June 2011 ('LO' (exh 'OCH1' of encl 6 at pp 76–93));

(b) facility agreement dated 28 July 2011 (exh 'OCH1' of encl 6 at p 33–93);

(c) purchase requisition of commodity by the plaintiff from customer (exh 'OCH1' of encl 6 at p 90);

(d) *Murabahah* sale contract dated 10 August 2011 (exh 'OCH1' of encl 6 at p 92); and

(e) letter of appointment as customer's agent (exh 'OCH1' of encl 6 at p 91).

[7] The above LO and facility agreement were issued and executed when the plaintiff had agreed to reschedule the existing trade finance facilities of RM2,500,000 granted previously (terms to cancel — p 76 of encl 6 exh 'OCH1')

[8] The relevant documents for *Tawarruq*-i Facility (2) granted to Customer (2) were as follows:

(a) letter of offer dated 26 July 2010 (exh 'OCH2' of encl 6 at pp 145–160);

(b) facility agreement dated 4 October 2010 (exh 'OCH2' of encl 6 at pp 95–144);

(c) purchase requisition of commodity by the plaintiff from customer (exh 'OCH2' of encl 6 at p 157);

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(d) *Murabahah* sale contract dated 13 August 2010 (exh 'OCH2' of encl 6 at p 159); and

(e) letter of appointment as customer's agent (exh 'OCH'2 of encl 6 at p 158).

[9] The above LO/cancellation letter and facility agreement were issued and executed when the plaintiff had agreed to reschedule the existing trade finance facilities as set out in Item 3(b), Schedule 1 of the facility agreement (exh 'OCH2' of encl 6 at pp 134–135).

[10] The payment of the abovementioned *Tawarruq*-i Facility (1) and *Tawarruq*-i Facility (2) were guaranteed by the defendant by the execution of the following documents:

(a) corporate guarantee and indemnity agreement dated 26 July 2011 by the defendant (exh 'OCH4' of encl 6 at pp 165–178) in respect of *Tawarruq*-i Facility (1) granted to Customer (1); and

(b) deed of guarantee and indemnity dated 4 October 2010 by the defendant (exh 'OCH5' of encl 6 at pp 180–195) in respect of *Tawarruq*-i Facility (2) granted to Customer (2).

[11] As a result of the events of default under the abovementioned *Tawarruq*-i Facility (1) and *Tawarruq*-i Facility (2) ('the facilities') both the Customer (1) and (2) had been wound up (exh 'OCH3' of encl 6 at pp 162–163). Vide encl 5, the plaintiff was pursuing against the defendant as the corporate guarantor. The plaintiff claimed that despite the letter of demand having been issued against the defendant as the corporate guarantor to claim the amount due and outstanding under the abovementioned facilities which payment was guaranteed by the defendant, the defendant had failed, refused and neglected to pay the said amount (exh 'OCH7' of encl 6 at pp 203–205).

[12] In support of its claim against the corporate guarantor, the plaintiff had exhibited the certificate of indebtedness in the name of Customer (1) and (2) to prove to this court the amount due and outstanding which the corporate guarantor had agreed to pay and indemnify the plaintiff pursuant to the corporate guarantee and indemnities executed by the defendant as illustrated above (exh 'OCH8' of encl 6 at pp 209–210):

(a) certificate of indebtedness to Customer (1) — p 209; and

(b) certificate of indebtedness to Customer (2) — p 203.

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ISSUES RAISED BY THE DEFENDANT

[13] In its attempts to resist the plaintiff's application for the prayers sought pursuant to encl 5, amongst others, the defendant contended that:

(a) it was not the party to the abovementioned facilities agreements;

(b) the certificate of indebtedness was not conclusive as it did not mention the name of the defendant and the plaintiff;

(c) the plaintiff's certificate of indebtedness also did not clearly depict the breakdown of the amount due and outstanding; and

(d) by executing the corporate guarantees and indemnities, it did not receive any consideration from the said facilities.

THE LAW

[14] In *National Company of Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283, the Federal Court had clearly laid down the preliminary requirements in an application for summary judgment under the O 14 of the then Rules of the High Court 1980 (now the Rules of Court 2012 ('ROC')) as follows:

(a) the defendant had entered appearance;

(b) the statement of claim must have been served on the defendant; and

(c) the affidavit in support of the application must comply with the requirements of r 2 of O 14 of the ROC. The application must be supported by an affidavit stating the deponent's belief that there is no defence to the plaintiff's claim.

[15] Once the plaintiff had satisfied the three requirements as set out in the above quoted case, the plaintiff has established a prima facie case and is entitled to judgment. The burden then shifts to the defendant to show the merits in the defence.

[16] It is trite that where all the issues are clear and the matter in substance can be decided once and for all without having to go through a full-blown trial, the matter ought to be resolved and decided in an O 14 application. The court should only exercise the power under the said provision in very clear cases (see *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332; [1987] CLJ (Rep) 120; [1987] 2 CLJ 9).

[17] In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 His Lordship Raja Azlan Shah CJ, (as His Highness was then) had stated as follows:

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> That brings us to the important question whether the assistant registrar was entitled to deal with the case under the RSC O 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under RSC O 14 procedure.

[18] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ (Rep) 14; [1992] 1 CLJ 627, the Supreme Court observed that:

> ... the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend the law arising from each case as disclosed in the affidavit evidence before the court.

[19] In the same case, the Supreme Court went on to state as follows:

> Thus, apart from identifying the issues of fact and law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[20] In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 the Court of Appeal held as follows:

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

(see *National Company of Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283).

FINDINGS OF THE COURT

[21] It is important to bear in mind that when deciding an application under O 14 of the ROC, the court must look at the whole situation and be satisfied that the defendant has no fair or reasonable probability in having a real or bona fide defence. The court has a duty to peruse and examine all affidavits and documentary exhibits critically before making a decision. In *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312; [1994] 1 CLJ 328 the Supreme Court held:

> It can hardly be emphasised that in order for the court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is

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stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

[22] With the above principles in mind, I had examined the documents before me in order to ascertain if the plaintiff was entitled to summary judgment as prayed in encl 5 or whether the defendants had satisfied this court on affidavit evidence that the defence had not only raised an issue but also the said issue is triable. The determination of whether an issue is or is not triable would depend on the facts or the law as disclosed in the affidavit evidence before the court.

ISSUE 1

The sums claimed were incorrect and/or baseless

[23] At the outset of the hearing of encl 5, learned counsel for the defendant had informed the court that he could not deny that *Tawarruq*-i Facility (1) and *Tawarruq*-i Facility (2) were in fact granted to the Customer (1) and (2) respectively and the same had been accepted and utilised by Customer (1) and (2). It was also admitted that both these entities had since gone into liquidation. During his oral submission before me, learned counsel for the defendant conceded that there was only one issue raised by the defendant, which merit the dismissal of encl 5. This issue relates to the correctness and/or conclusiveness of the certificate of indebtedness relied by the plaintiff to prove the defendant's indebtedness to the plaintiff as a corporate guarantor. Learned counsel for the defendant indicated to me that he would not be pursuing with the other points raised in the written submission. However, for the sake of completeness and in abundance of caution I had dealt with other issues under Issue 2 and Issue 3 as set out in paras 31–33.

[24] I observed that this line of submission was adopted by learned counsel from the bar table without the benefit of the evidence by way of affidavit to indicate that there was manifest error on the face of the said certificate of indebtedness. I am of the view that the defendant could not arbitrarily dispute the accounts of the plaintiff without showing evidence of manifest errors in its affidavit. In order to challenge the correctness and/or conclusiveness of the certificate of indebtedness, something more was required of the defendant other than raising the same vide his learned counsel's written and oral submission. This would also give ample opportunity to the plaintiff to rebut all allegations made in the affidavit by way of affidavit evidence. As this was not done, the plaintiff was not in a position to explain how the calculations as shown in the certificate of indebtedness were arrived at. In so far as the plaintiff was concerned, once the certificate of indebtedness had been exhibited, the

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plaintiff was not obliged to provide further evidence of the outstandings. In fact under the law, it was for the defendant to show evidence of manifest error, which the defendant had failed to do by way of affidavit evidence. The defendant had further claimed that the said certificate of indebtedness is baseless but had not demonstrated by way of affidavit evidence how the said certificate was said to be baseless.

[25] Pursuant to cl 1 of the guarantee and indemnity, dated 26 July 2011 the defendant had guaranteed to pay the plaintiff in full all monies owing and payable by the Customer (1) to the plaintiff. Clause 24 of the deeds of guarantee and indemnity stipulated that the certificate of indebtedness is conclusive evidence of the indebtedness (see exh 'OCH-4' to encl 6). Pursuant to cl 1(a) of the guarantee and indemnity, dated 4 October 2010 the defendant agreed to pay the plaintiff in full all monies owing and payable by Customer (2) to the plaintiff. Clause 2(o) of the guarantee and indemnity stipulated that the certificate of indebtedness issued by the plaintiff is conclusive proof of Customer (2)'s indebtedness to the plaintiff.

[26] Pursuant to the abovementioned cll of the guarantee and indemnity, the plaintiff was only required to exhibit the certificate of indebtedness and once this was done, there was conclusive evidence before the court of the defendant's indebtedness to the plaintiff. Under the law, the plaintiff was not required to do more than to exhibit the certificate of indebtedness. In the event the same was disputed by the defendant, the defendant had to show by way of affidavit evidence that there were manifest errors in the sums claimed as stated in the said certificate of indebtedness. In the case before me, the defendant had not shown in its affidavit that there were manifest errors in the certificate of indebtedness which were exhibited by the plaintiff. Hence, the certificates of indebtedness issued pursuant to cl 24 and the corporate guarantee and indemnity dated 26 July 2011 and cl 2(o) of the deeds of guarantee and indemnity dated 4 October 2010 were lucid enough. There was nothing before this court to suggest that there was manifest error on the face of the certificate of indebtedness which was exhibited by the plaintiff in encl 6 as claimed by the defendant.

[27] A perusal of encl 8 filed herein, would show that the defendant had not discharged the burden to disprove the certificate of indebtedness. There was no evidence before this court by way of affidavit evidence that the certificate of indebtedness was tainted with manifest error on the face of the said certificate nor was fraud shown. In short, the defendant had failed to show any errors in the sums stated in the said certificate of indebtedness. In *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 the court held:

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A certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed. In the instant case, the relevant cls 27 and 7.03 of the loan agreement and guarantee agreement respectively were sufficiently clear. A clause of this nature has been described as a conclusive evidence clause and has been held to be binding and valid by courts in Australia and England. The certificate of indebtedness, issued in accordance with the aforesaid cls 27 and 7.03, was lucid enough. There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown (paras 6–7).

[28] The affidavit filed in opposition of encl 5 did not challenge the figures stated in the said certificate but the same was raised by learned counsel during oral submission from the bar table. Since the same was not challenged by way of affidavit evidence, all averments by the plaintiff in encls 6 and 9 were deemed to have been accepted and/or admitted by the defendant (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

[29] It was also expressly provided in both the guarantees and indemnities, that the defendant had unconditionally and irrevocably guaranteed and agreed as principal debtor and not merely as surety to pay, indemnify and satisfy the plaintiff upon demand all sums due and outstanding from Customer (1) and (2) to the plaintiff in respect of the facilities granted to Customer (1) and (2) including all profits, costs, charges, expenses and legal charges, which the plaintiff might incur. It was not opened to the defendant to dispute the certificate of indebtedness without showing any manifest errors in the said certificate by way of affidavit evidence. As the defendant had failed to show any error in the sums set out by the plaintiff in the certificate of indebtedness, the defendant could not challenge the plaintiff's calculations or the certificate of indebtedness as the conclusive evidence clause stated in the guarantees and indemnities which the defendant had agreed to be bound would apply (see *Kewangan Bersatu Bhd (formerly known as Kewangan Usaha Bersatu Bhd) v Sidax Latex Industries Sdn Bhd* [2006] 2 MLJ 9, *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor*).

[30] The sums claimed by the plaintiff against the defendant represents the sums, which were the same as the proof of debt form filed with the liquidators of Customer (1) and (2) which were wound up (see exh 'OCH14' of encl 9).

ISSUE 2

Whether the defendant was liable to the plaintiff

[31] At para 8, of encl 8 the defendant contended that as it was not a party and/or privy to the *Tawarruq*-i Facility (1) and *Tawarruq*-i Facility (2), it was not liable to pay the outstanding sums to the plaintiff. The defendant in the

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case at hand was a corporate guarantor as well as the holding company of both the Customer (1) and (2). In respect of Customer (1), the defendant held 97% of the shareholding of this entity. Whilst in respect of Customer (2) the defendant held 100% of Customer (2)'s shareholding. These entities had common signatories/directors including the deponent of encl 8, Mr Cha Chee Pin who had executed some of the facilities agreements (see exh 'OCH1', 'OCH2', 'OCH4' and 'OCH5' of encl 6).

[32] Being a corporate guarantor, the defendant had full knowledge pertaining to the *Tawarruq*-i Facility (1) and *Tawarruq*-i Facility (2) granted to Customer (1) and (2). There were documents executed by the defendant for purposes of extension of time to negotiate for repayment and/or restructuring of these two facilities (see para 4.2.4 of encl 9 and exh 'OCH13' of encl 9). As I had shown under Issue 1, the defendant was a corporate guarantor who had unconditionally and irrevocably agreed as principal debtor and not merely a surety to pay, indemnify and satisfy the plaintiff upon demand all sums due and owing by Customer (1) and (2) to the plaintiff. Therefore, with this glaring evidence before this court it was not opened to the defendant to dispute the same at this stage. I am of the view that there were no merits in this argument as this was a bare denial and unsupported by facts and law.

ISSUE 3

There was no consideration provided by the defendant

[33] The defendant contended that the guarantees and indemnities executed by the defendant were void as there was no consideration and/or due to past consideration. This was because the guarantees and indemnities were executed after the letter of offer. There were no merits in this line of argument, as there are ample authorities on point to illustrate the validity of these kind of guarantees and indemnities. It had been held in *Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd* [2004] 4 MLJ 453 where the issue pertaining to the date of the letter of guarantee being later than the date of the execution of the agreement, that it did not render the contract of guarantee to be void for past consideration. In *Ali @ Abdul Aziz bin Hassan v Perwira Affin Bank Bhd* [2007] 4 MLJ 209, the Court of Appeal held that a continuing guarantee is valid for past consideration. In *Standard Chartered Bank Malaysia Berhad v Foreswood Industries Sdn Bhd & Anor* [2004] MLJU 175; [2004] 6 CLJ 320, the court held that the plea that a guarantee executed after the loan was granted was unenforceable as it was given for past consideration must fail. This type of plea must be rejected, as it did not give rise to bona fide issue, which is required to be tried. Despite the loan was disbursed before the letter of guarantee was executed, the court in the case of *Perwira Habib Bank (M) Bhd v Saiyo Sdn Bhd & Ors* [1991] 3 CLJ (Rep) 451 held that there was good consideration.

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A CONCLUSION

[34] I am satisfied that the plaintiff had demonstrated to this court that its application was correctly and properly filed and the defendant had not discharged the burden to establish triable issues requiring a trial of the plaintiff's claim, in that, the issues that pass the test of bona fide triable issues to be supported by documents contemporaneous to the granting of the facilities which were precise and/or consistent with the undisputed contemporary document (see *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor*; *Bank Negara Malaysia v Mohd Ismail & Ors*).

[35] I am satisfied that the issues raised by the defendant in the affidavit filed herein did not pass the test of 'triable issues' as envisaged by the case law quoted above. The defendant's affidavit contained bare averments and denials and did not constitute evidence and do not give rise to triable issues. On the contrary, I found that the plaintiff had exhibited sufficient documents as required of it to show that the defendant's denials not only have no basis in fact but are also made in bad faith.

[36] Having considered the pleadings, the affidavits filed herein and the submissions by the respective counsels from both sides and having given the matter a very careful and serious consideration, I am of the view, based on the facts in this case, it is a straightforward and proper case to be disposed of by way of summary judgment under O 14 of the ROC. Accordingly, I allowed the prayers sought vide encl 5 with cost of RM4,000 to be paid by the defendant to the plaintiff.

Application allowed with costs of RM4,000.

Reported by Kanesh Sundrum